STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY D. LEAGUE,

Defendant-Appellant.

UNPUBLISHED
July 17, 2003

No. 237168
Wayne Circuit Court
LC No. 01-000879-01

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316, and first-degree child abuse, MCL 750.136b(2). He was sentenced to a mandatory term of life imprisonment without possibility of parole.[1] Defendant appeals as of right. We affirm in part and vacate in part.

FACTS

This case arises from the scalding and subsequent death of 2-1/2 year old Alize Charvelle Williams. The prosecution's theory of the case was that defendant was angry with Alize for defecating in her Pull-Up and punished her by immersing her in scalding water in the bathtub. The defense theory of the case was that Alize was in the bathtub and was accidentally injured when she turned on the hot water after defendant left the bathroom to answer the telephone.

Alize was the daughter of defendant's girlfriend, Diamond Dorsey. On November 26, 2000, Officer Susan Upton of the Inkster Police Department was dispatched to 1820 Heatherwood, Apartment 103, in Inkster in response to a 911 call regarding a "scalded child in a tub." When she arrived at the apartment at 4:49 p.m., she observed defendant standing in the doorway to the apartment. Defendant stated that, "I was trying to give her a bath and I guess it was too hot." Officer Upton turned and saw a naked child lying in a fetal position on a blue towel in the hallway. Alize was bright red from her chin to her toes, skin was missing, and flesh

[1] Defendant's motion in the trial court for a new trial and/or for a *Ginther* hearing was denied. *People v Ginther*, 390 Mich App 436; 212 NW2d 922 (1973). Likewise, defendant's motion to remand in this Court for a *Ginther* hearing was denied.

was hanging from her body. Alize was semi-conscious and was crying. Officer Upton observed large pieces of flesh trailing from the hallway into the bathroom. The water in the tub had been drained, and there were pieces of flesh surrounding the drain area of the tub and on the side of the tub.

Officer Dean Toward of the Inkster Police Department testified that as he approached the apartment he heard a "loud football game on TV." He observed defendant standing in the doorway of the apartment watching the TV. Defendant told Officer Upton that he was filling the tub with water and the water "turned hot and burned his stepdaughter." Defendant indicated that he was in the next room watching football at the time. Officer Toward noticed a stench in the apartment. When he went into the bathroom he noticed the smell of feces and observed flesh sticking to the side of the tub.

Alize was wrapped in sterile wrappings and taken by ambulance to Anapolis Hospital. Donald Ray Schipper, an emergency room physician at Anapolis Hospital, testified that Alize was at Anapolis Hospital for approximately thirty to forty-five minutes before she was transferred to a comprehensive burn center. He indicated that Alize was burned from head to toe and that the skin was off her entire body except for a small area on her right hand and her face. She suffered from "full thickness burns all over" and "whole sheets of her skin were dripping off." Alize was sent to the University of Michigan by helicopter. Dr. Schipper testified that he had "never seen someone burned to this extent" and that someone with such burns generally would not survive.

Dr. Elaine Pomeranz, the Medical Director of the Child Protection Team of the Pediatric Department at the University of Michigan Medical Center, was qualified as an expert in forensic pediatric medicine and as a specialist in evaluating burns in children. The Trauma Burn Team at the University of Michigan consulted her with regard to child abuse in this case. The child suffered burns over ninety percent of her body. Her burns were deep partial (2^{nd} degree) and full (3^{rd} degree) thickness burns. Dr. Pomeranz testified that burns significantly impair body functions and organ functioning. She has never seen a child burned as badly as Alize who survived. She noted a sharp line of demarcation at Alize's neck just under the chin and at the wrist. Dr. Pomeranz testified that the burns were scald burns and that the burns were not accidental. She explained that the injury could not be sustained voluntarily because a person of Alize's age would respond to the hot water and try to get out of the very painful situation. She indicated that immersion for fifteen to twenty seconds would be required in order to result in the extensive burns Alize suffered.

An investigation was conducted by the police department to determine the temperature of the water. Officer Upton testified that the hot water ran for twenty-five seconds before the water became too hot and she had to remove her hand from the water. A test of the water temperature indicated that the water was between 135 and 140 degrees when the water was at the "scum" level of the tub, approximately seven inches deep.

Dr. Wendy Wahl, the Director of Critical Care Services for the Trauma Burn Unit at the University of Michigan Medical Center, was qualified as an expert in trauma burns. She was Alize's admitting physician. Dr. Wahl testified that Alize was burned over ninety percent of her body, with the exception of her right hand and from the chin up. This was the worst scald burn she had ever seen. Dr. Wahl explained that the blood flow in a severely burned body is

compromised and that Alize suffered infections and pneumonia and that she started growing bacteria out of her body. Several skin grafts using cadaver skin were attempted, but bacteria invaded Alize's blood, lungs, and wounds, and her organs began to die. On December 22, 2000, Dr. Wahl concluded that death was inevitable.

Diamond Dorsey testified that she met defendant in January 2000 and that they began living together in June 2000. Defendant often babysat Alize. Alize was in the process of being potty trained and wore Pull-Ups. Dorsey explained that Alize would occasionally relieve herself in her Pull-Up. Dorsey testified that defendant was the only adult home when she left for work on November 26, 2000. She testified that defendant called her at work and that she went home. When she arrived at home, the police told her that her daughter was badly burned and had been taken to the hospital.

Three statements were obtained from defendant in defendant's own handwriting. Defendant was given his Miranda rights before each statement. In the third statement, defendant said that his first two statements were lies. In his third statement, defendant wrote:

> I was watching the game while the baby was eating. After a while she was done. I told her to come here so I can check her pull-up. While I was checking it, she used it in the pull-up. So I got mad then told her to go to the potty.
>
> Later I went in to see if she was done. She was almost done. So I told her to sit down again. Two minutes I went back in there, and she was done. So I took off her socks and her pull-up and started running the water.
>
> After it got about five to six inches, I put here in there, and she wouldn't sit down, and she started moving her hands around. But I told her to sit down, and she wouldn't at first. So I took her by the hand and sat her down myself. Started to wash her up, but the phone rang. So I went to answer it.
>
> While I was on the phone, the baby was kicking and crying, but I didn't pay her no attention.
>
> So I got off the phone and then looked at the game for a minute, and then I went back to the bathroom because the baby was crying, "it's hot."
>
> So I got in there, got her out and there she burned. So when I saw that, I freaked out. Then ran to the phone. Called her mother and told her what happened, and she said, "calm down." I'll be there in a minute."
>
> So after that I called 911.

Defendant's statement then continued in a question and answer format with Detective O'Brien asking specific questions, and with each answer being written by defendant and initialed by him at the end at the end of the statement:

> *Q*. Did you touch the water when you "started" to bathe her?
>
> *A*. No, I didn't.

Q. What did you do when you put her in the water?

A. She was moving her hands saying it was hot.

Q. Did you push her to the bottom of the tub?

A. Yes. I grabbed her and sat her down.

Q. Were you angry with her at this time? I'm sorry. Were you angry at her at this?

A. Yes; I was mad at her at that time because she used the bathroom in her pull-up.

Q. Were you still mad at her when you went to watch the game?

A. No. I was not still mad at her because its normal.

Q. Are the other statements you've made to us true or false?

A. All the other statements was false because I was scared.

Q. Is this the only truthful statement you have made to us about this incident?

A. Yes. This is the full truth period.

Detective Martin testified that defendant never indicated that the child turned on the water.

Detective Barry O'Brien of the Inkster Police Department testified that he talked to defendant after reviewing defendant's first statement. Defendant did not appear upset and did not ask about the child's condition. Defendant talked about the football game that he watched the evening of the incident and about the telephone call that he received. Defendant indicated that he checked on Alize approximately four or five minutes after he first heard her yell. He did not check on her immediately because he was watching the football game.

Dr. Bader Cassin, a forensic pathologist and medical examiner, performed the December 23, 2000, autopsy. He explained that Alize was 35-1/2" tall and weighed forty-three pounds. She was burned over ninety-percent of her body. Areas not burned included her face, some of her skin folds, the outside of her vagina, and her right hand from the wrist out. Dr. Cassin testified that the burns were immersion scald burns and were partial to full thickness burns. He opined that the burns were not accidental because a body's natural reflex would be to escape the pain quickly, and Alize was of sufficient size and age to be able to climb out of the tub. He explained that a child would have had to be continuously immersed for this type of injury to occur. Dr. Cassin testified that nobody would survive this extent of burns. He explained that the manner of death was homicide. Dr. Cassin opined that Alize was grabbed by the hand and placed into the water. The injury pattern suggested that the body was forced into the water in a seated position first, but that the knees were close together, keeping the groin tissue preserved. He further opined that a hand was placed on Alize's face to force her into the water.

Defendant testified that he moved in with Dorsey in June 2000. He testified that he lost his job in September 2000 as a result of being unable to work overtime because he had to get home in time to watch Alize before Dorsey left for work. He generally bathed Alize at least twice a week. On the day of the incident, Alize woke up at 12:30 p.m., and defendant was watching TV. He told Alize to go to the bathroom. Defendant then changed Alize's diaper and gave her lunch while he watched TV. After lunch, defendant told Alize to take off her Pull-Up and go to the bathroom. Defendant then emptied the potty seat and ran a bath for Alize. Alize complained that the water was too hot, but defendant was not concerned because she would "always say that." Defendant was going to bathe Alize when the phone rang. After concluding the telephone call, defendant started to watch TV. Defendant could hear Alize playing in the bathroom. When defendant went into the bathroom, he saw Alize floating in the tub with the hot water running. The water was too hot to touch, so defendant turned off the water and drained the tub before removing Alize from the tub.

Defendant wrapped Alize in the towel and stood her up outside the tub. He then called Dorsey and then called 911. After making the calls, defendant observed Alize lying on the floor beside the toilet. He wrapped her up and put her in the hallway. Defendant then went to the front door to see if the police had arrived. When Officer Upton arrived, she went to the child. Defendant then sat in the hallway until the ambulance arrived.

Defendant testified that he only stated in the third statement that the first and second statements were false because that is what the police officers wanted him to say. Defendant admitted that he was frustrated because Alize was not potty-trained, and he also admitted that the testimony he was giving was different than any other statement he had made in the past. Defendant admitted that he never before told anyone that Alize turned on the water

Defendant presented three character witnesses who testified that defendant is non-violent and has a good reputation for honesty

On rebuttal, Dr. Cassin testified that defendant's version of the events was not consistent with the evidence. He testified that Alize's injuries were not consistent with a body that was stretched out and "floating." Dr. Cassin explained that if Alize had been floating on her back, sparing would not be present on her body, yet the body had sparing in several places.

I

Defendant first argues that he was denied the effective assistance of counsel on numerous occasions throughout the trial. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Regarding counsel's performance, a defendant must overcome the strong presumption that the attorney's action constituted sound trial strategy. *Id.* Regarding prejudice, the defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different . . .." *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 506 NW2d 600 (1997).

A

Defendant first contends that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction on the lesser offense of second-degree child abuse.

An instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). However, an instruction on a cognate lesser included offense is not permissible. *Reese, supra; Cornell, supra* at 359; *People v Alter*, 255 Mich App 194, 200-201; 659 NW2d 667 (2003).

There is no published authority for the assertion that second-degree child abuse is a necessarily lesser included offense of first-degree child abuse. Assuming, without deciding, that second-degree child abuse is a lesser included offense of first-degree child abuse, defendant has failed to overcome the strong presumption that his attorney's action constituted sound trial strategy. *Toma, supra* at 302. The lower court record in this case reveals that defense counsel's primary theory at trial was that it was Alize who turned on the hot water while he was out of the room. During counsel's opening statement to the jury, he stressed that there was no physical evidence that defendant had scald marks anywhere on his body that would be consistent with the prosecution's theory that defendant held Alize down in the water. It appears from the record that defense counsel did not want to give the jury an opportunity to convict defendant of a lesser offense. As the prosecutor points out, "defense counsel's strategy was obviously to force an all or nothing verdict." This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's performance with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

B

Next, defendant asserts that defense counsel never informed him that the intent element of felony murder could be based on wanton and willful disregard for the natural consequences of one's action. He asserts that counsel's lack of advice deprived him of the opportunity to pursue a plea bargain. However, defendant has not alleged that a plea bargain was offered, and an affidavit in the lower court record submitted by the assistant prosecutor who tried the case states that the evidence in this case was so overwhelming that [no plea bargain] would have been forthcoming. This Court has held that counsel's failure to convey a plea agreement to a lesser charge can constitute ineffective assistance of counsel that requires reversal and the opportunity to plead to the lesser charge, if the defendant can establish that the defendant would have accepted the plea if the defendant had known about the offer. *People v Carter (On Reh)*, 190 Mich App 459; 476 NW2d 436 (1991), opinion vacated and the matter remanded for an evidentiary hearing in accordance with this Court's opinion, 440 Mich 870 (1992), affirmed after remand *People v Carter*, unpublished per curiam opinion of the Court of Appeals (Docket No. 154864, issued September 14, 1993). However, defendant has failed to cite any authority for

finding the ineffective assistance of counsel based upon the missed opportunity to pursue a plea bargain that has not been offered.

Defendant also argues that defense counsel erred by failing to present expert testimony and the testimony of the emergency medical technicians to support defendant's theory that Alize went into shock after being exposed to the hot water. However, evidence that Alize was in shock when the emergency medical technicians arrived at the scene would not have significantly supported defendant's theory. Defendant's theory required evidence that Alize went into shock rather quickly after the hot water scalded her and that the state of shock prevented Alize from escaping or attempting to escape the bathtub. Evidence that Alize was found in the state of shock after ninety percent of Alize's skin had been scalded and was peeling off of her would not have established that Alize went into the state of shock soon after Alize had accidentally turned on the water. Defendant also suggests that if counsel had contacted a medical expert he would have realized that his accident theory was not plausible. A review of the record presented does not reveal whether, in fact, defense counsel consulted any experts regarding this case. Therefore, it cannot be said on this record that counsel's performance was deficient in this respect.

Defendant also contends that his attorney wrongfully posed the defense of intervening causes – i.e., the decision to remove Alize from life support – which resulted in the trial court discrediting defense counsel by telling the jury "that there was no evidence either to support the defenses or that the defense was no defense at all." However, a review of the record reveals that the primary defense theory was accident. Although defense counsel did comment about such topics as Medicaid, lack of insurance, and removal from life support, defense counsel was directed not to argue that Alize's death resulted from intervening causes. Additionally, the trial court never referred to defense counsel's reference to these topics as "defenses" and never informed the jury that there was no evidentiary support for the "defenses."

C

Defendant contends that defense counsel was ineffective for failing to call Sandra Richardson as a witness to confirm his testimony that she telephoned defendant and that defendant answered the phone. However, the prosecutor did not dispute the fact that defendant received a telephone call as he was preparing to bathe Alize. Therefore, the failure to call Richardson did not deprive defendant of a substantial defense.

D

Defendant argues that his attorney erred by failing to move to suppress defendant's custodial statements as having been involuntary. He argues that he was coerced into waiving his *Miranda* rights and giving three statements to the police due to the circumstances of his confinement, his mental and physical state, and the police offers to help him if he gave the statements. According to defendant, his first statement was given after having been confined in a small cell for five to six hours. The statement was given near midnight, he was distraught, and he had not eaten since that afternoon. The second statement was given about 11:00 a.m. the next day after defendant had spent the night on the floor of a cell, having gotten little sleep. Furthermore, defendant was dressed only in his shorts and socks because he had been ordered to remove his other clothing at 6:00 a.m. Defendant argues that he was pressured into giving this

statement because the police promised to help him. The third statement was given later that evening at about 6:00 p.m., with defendant still dressed only in his shorts and socks.

Defendant argues that the statements were involuntary and prejudicial because the statements, which were introduced in the prosecution's case-in-chief, showed that defendant lacked credibility. Furthermore, defendant argues that the third statement includes defendant's admission that he was mad at Alize and this admission was used to establish the mental state for first-degree felony murder.

However, the record also shows that defendant waived his rights before giving each of the three statements and there is no evidence in the record of such coercive conditions as to establish that a motion to suppress the statements would have been successful. The defendant's affidavit filed in support of his motion to remand states only that trial counsel failed to discuss with defendant the facts and circumstances surrounding the taking of his statements. Defendant's affidavit contains no description of his mental state or claims that his statements were coerced or involuntarily given. Under these circumstances we cannot conclude that defense counsel's failure to move to suppress the statements denied defendant the effective assistance of counsel.

E

Defendant asserts that his attorney failed to request an instruction on specific intent and causation. Specifically, defendant argues that the trial court erred in failing to instruct the jury on the specific intent necessary for first-degree child abuse in accordance with CJI2d 3.9. Here, during its instructions on the offense of first-degree child abuse, the trial court instructed that the prosecutor must prove each element of the offense beyond a reasonable doubt, and listed the intent to cause serious physical harm as an element of the offense of first-degree child abuse. Because the trial court's instruction was not improper, defense counsel was not ineffective for failing to request an instruction on specific intent.

Defendant also argues that trial counsel failed to request an instruction on "inferring state of mind." This instruction states, "The defendant's state of mind may be inferred from the kind of weapon used, the type of wounds inflicted, the acts and words of the defendant, and any other circumstances surrounding the alleged killing." Defendant suggests that his actions of calling 911, calling Dorsey, and waiting for the police could have been used by the jury to infer what defendant's state of mind was at the time of the incident. However, defendant's defense was that the child was accidentally injured when she turned on the hot water. Defendant's state of mind was not at issue with regard to defendant's defense.

Next, defendant asserts, without argument or citation to authority, that trial counsel failed to request CJI2d 16.15, which instructs that the prosecution must prove beyond a reasonable doubt that death was the natural or necessary result of the defendant's act. Because defendant has failed to properly argue this issue, we need not address it.

Defendant also contends that the trial court failed to request an instruction on the defense of accident. However, the jury was instructed that it could not convict defendant if the prosecution did not prove that defendant had the requisite intent to commit the crime. Thus, if the jury chose to believe defendant's theory of accident, it would have been required to find him

not guilty of first-degree child abuse. Defense counsel was not ineffective for failing to request an instruction on the defense of accident.

F

Defendant argues that he was denied his attorney's failure to object to several instances of prosecutorial misconduct. He first contends that defense counsel failed to object to the prosecutor's closing statement that defendant was angry at the time of the crime because money was "tight." He contends that this statement was not supported by the facts and "lowered the prosecution's burden of proof." Defendant does not explain how the prosecutor's statement lowered the burden of proof. Nonetheless, a review of the record reveals that the prosecutor recited a number of facts to show that defendant was under stress at the time that he became angry with the child:

> Sure, after two months of being unemployed losing your job, money had to be tight. Remember they are sharing bills up to that point.
>
> Now it's just Diamond coming in with the paycheck and trying to support that family. Money is tight. Defendant loses his job. Baby won't be potty-trained. A football game is on. I want to watch it. I'm ticked off. We'll go in the bathroom and I'll teach her a lesson.

A review of the prosecutor's comments in context reveals that the prosecutor's comments were based on the evidence presented at trial and stated a reasonable inference arising from the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant also maintains that trial counsel failed to object when the prosecutor stated in her closing argument, "Dead men tell no tales . . . . In this case, Alize Williams is crying from the grave trying to tell us what happened to her. She is not here to tell us. So what do we have to rely on? We have to rely on her injuries and the testimony of experts to tell us what those injuries mean." Defendant argues that this comment asked the jury to sympathize with the victim. We disagree. By this statement, the prosecutor was informing the jury that, even though the victim was unable to testify, the facts of the case could be established through an examination of her injuries and expert testimony.

Defendant also suggests that the prosecutor vouched for her case with the above comment. "A prosecutor may not vouch for the evidence or place the weight of his office behind the prosecution; but, ... he may argue regarding the credibility of witnesses where the testimony conflicts and the result depends on which of the witnesses is to be believed." *People v Foster*, 77 Mich App 604, 612-613; 259 NW2d 153 (1977). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Defendant does not explain this argument, and we fail to see how the comment that "dead men tell no tales" urged the jury to suspend its own judgment powers out of deference to the prosecutor or police.

Defendant also argues that the prosecutor vouched for her case when she told the jury that the judge had to instruct on the lesser offense of second-degree murder. He maintains that the comment "implies to the jury that the prosecution has some knowledge of what the trial judge thinks." A review of the prosecutor's comments in context reveals that the prosecutor stated"

> The judge is going to instruct you on two main charges, first-degree felony murder, and by the law the Judge has to instruct you on a lesser offense call [sic] second-degree murder. The judge is also going to instruct you on child abuse first degree, the charge in this case. And as the Judge talked about initially, we have to prove the elements of the crime beyond a reasonable doubt."

We fail to see how a prosecutor's statement that the court will instruct on lesser included offenses urges the jury to suspend its own judgment powers out of deference to the prosecutor or police.

Next, defendant contends that defense counsel failed to object to the following comments made by the prosecutor during closing arguments:

> Unfortunately, things like this happen in today's society all the time. There's atrocities that one person commits on another all the time. That's the way life is. You don't like it. That's the way mothers kill babies when they shake them, shaking [sic] baby syndrome. We have fathers that kill babies, maybe they punch them.
>
> We can't phantom [sic] why somebody would do this, but we hear of children killing parents. We hear of people murdering other people, and lots of time we look at it and we say why? Why would something like this happen. But it happens, and it happens every day. Every day. I still can't tell you why this happened. I can tell you though the evidence it happened.

Defendant contends that the above comment was a civic duty argument. A civic duty argument diverts the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor's comment did not ask the jury to support the police or make predictions about the consequences of the verdict. Rather, the prosecutor was making a point that people commit crimes all the time for unknown reasons and that she did not have to prove why defendant injured Alize but, rather, had to prove by evidence that he knowingly or intentionally caused serious physical harm to Alize.

Defendant also argues that trial counsel failed to object when the prosecutor argued on rebuttal:

> He also before the police got there, could have put on a different shirt . . .. Maybe he put a shirt on before the police got there as the baby is lying on the wet towel. We don't know. That's not conclusive.

Defendant contends that the prosecutor was simply asking the jury to speculate when she made the above comment because no evidence was presented that defendant changed his shirt. This writer disagrees. The prosecutor's comment was made in response to defense counsel's comment to the jury to "look at the lack of evidence of scalding on my client or wet clothes or wet clothing on my client or skin on my client." The prosecutor argued that the lack of wet clothing was not conclusive because defendant could have changed his clothes. Otherwise

improper comments may not require reversal if the prosecutor made the comments in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant also argues that trial counsel failed to object when the prosecutor asked the jury to use an incorrect standard for determining reasonable doubt. The prosecutor stated that reasonable doubt was where "you look at your soul of souls, you believe that evidence presented shows that this man is guilty, then the case has been proven to you beyond a reasonable doubt." Although the prosecutor's comment did not comply with the standard definition of reasonable doubt, this comment did not deny defendant a fair and impartial trial because the trial court read the correct instruction before opening statements and closing argument began, and during jury instructions.

II

Defendant argues that he was denied his right to a fair trial by the trial court's failure to give the jury instructions on specific intent, causation, accident, and inferring state of mind. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 768.29; *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

A review of the record reveals that the trial court properly instructed the jury on the elements and requisite intent of the charged offenses. Felony murder is a general intent crime, requiring the mens rea of second-degree murder during the commission of a felony. See *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). The trial court properly instructed the jury that "the prosecutor must prove beyond a reasonable doubt each of the following elements." The court then listed the intent necessary for the charged offenses. Thus, manifest injustice did not result from the omission of a separate instruction on specific intent.

With regard to instructions on state of mind, causation, and accident, we have already concluded that defendant was not prejudiced by the failure to instruct on these topics.

III

Defendant asserts that he was denied a fair trial by the instances of prosecutorial misconduct discussed in Issue I with regard to his claim of ineffective assistance of counsel. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Bahoda*, *supra* at 266-267 nn 5-7. Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, however, most of the alleged errors were not preserved with an appropriate objection at trial. Accordingly, we review those issues for plain error affecting defendant's substantial rights. *Schutte*, *supra* at 720. As discussed in Issue I, however, the prosecutor's comments were either not improper or were made in response to comments made by the defense. Defendant has not established plain error affecting his substantial rights.

IV

Defendant next argues that the evidence was insufficient to support a finding that defendant had the intent to commit great bodily harm or had a "wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Uncontroverted medical testimony and evidence was presented that established that Alize was forcibly submersed in scalding water and that she suffered partial and full thickness burns over ninety percent of her body. This evidence is sufficient to support a finding that defendant had the intent to commit great bodily harm or had a wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm.

V

Defendant argues that the trial court erred when it (1) stopped defense counsel from arguing that had the child been given time, her skin would have grown back and telling the jury that there was no evidence that the child was improving and (2) when it told the jury during final instruction as follows:

> Let me indicate to you specifically, ladies and gentlemen, there was some reference in the closing argument that we heard this morning with regard to the fact that one point there was a comment made about the fact that the skin of the deceased, Alize Williams, would grow back, and there was testimony with regard – there was argument with regard to the fact that the deceased would have survived if a colostomy had been performed.
>
> Ladies and gentlemen, I'm telling you as a matter of law in this case you cannot consider those comments. There was not evidence introduced in the record to either indicate that or from which an inference could be drawn.

Defendant also objects to the following comment by the court during final instructions:

> Now, ladies and gentlemen, I want to indicate to you that with regard to – you in fact heard some testimony, and there has been some argument and reference to the notion of life support being pulled in this particular case.
>
> With regard to this being pulled in this particular case with regard to this child, I want you to understand that under the law in the State of Michigan that the decision to carry out the termination or the stopping of life support treatment is not in the eyes of the law a cause of a patient's subsequent death.
>
> The discontinuance of life support measures merely allows the patient's injuries or illness to take its natural and inevitable course.

The trial judge has a duty to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. *People v Sowders*, 164 Mich App 36, 48; 417 NW2d 78 (1987). Trial courts have wide powers of discretion in fulfilling this duty. *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986). Here, the trial court was attempting to remain in control of the proceedings and to make certain that only relevant material matters were brought before the jury. *Sowders, supra* at 48. Indeed, the trial court had previously ruled during a motion in limine that the removal of life support was not an intervening cause of death and cautioned defense counsel about using this argument. Further, absolutely no evidence was presented to support the inference that Alize was improving or that a colostomy could have saved her life, and the trial court had a duty to limit the closing arguments to relevant evidence. The trial court's conduct, comments and questions did not pierce the veil of judicial impartiality. *People v Burgess*, 153 Mich App 715, 720; 396 NW2d 814 (1986), and did not deny defendant a fair trial.

VI

Defendant's final argument is that the cumulative effect of the errors necessitates reversal. Having found no errors in the issues raised by defendant, there is no cumulative effect that necessitates reversal.

VII

Although not an issue raised on appeal, it is well established that convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution. *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996), *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Accordingly, we vacate defendant's conviction and sentence for the predicate felony, first-degree child abuse, and remand for preparation of an amended judgment of sentence. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Resentencing is not required, however, because defendant received a mandatory sentence for his felony murder conviction.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald